Persatuan Pegawai-Pegawai Bank Semenanjung (M) (ABOM) v Ketua Pengarah Kesatuan Sekerja, Malaysia & Ors

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO R1–25–54 OF 2011
ABANG ISKANDAR J
1 JUNE 2012

Civil Procedure — Certiorari — Application for — Recognition of executive officers by director-general — Application for judicial review — Certiorari order to quash decision — Rules of the High Court 1980 O 53 — Whether decision erroneous and contradictory of s 12(2) of the Trade Union Act 1959

The applicant had been the recognised union by the Director-General of Trade Union ('R1'), for all officers in all commercial banks in Malaysia in the job band commonly referred to as 'executives'. R1 had recognised the Kesatuan Eksekutif Bank Islam Malaysia Bhd ('KESATRIA') ('R2') who actually had been composed of executive officers of Bank Islam Bhd, ('R3'). Aggrieved by the recognition, the applicant applied for a judicial review under O 53 of the Rules of the High Court 1980, for a certiorari order to quash the said decision by R1 in granting recognition to R2. The applicant contended that the said decision was erroneous and contradicted s 12(2) of the Trade Union Act 1959 ('the Act'). Although R1 had the discretion under s 12(2) to register a trade union, the applicant contended that the discretion may not be exercised in favor of registering a trade union 'if he is satisfied that there is in existence a trade union' and that it was not in the interest of the workmen concerned that there be another trade union.

Held, dismissing the application with costs:

(1) The applicant had not shown exceptional circumstances as to why this matter ought to be brought before the present court. There is in existence a provision in the Act, for an appeal to be made to the Minister by the applicant if it was not satisfied with the decision of the Director-General ('DG') in registering the R2 as an in-house trade union within the R3 bank. The DG had the necessary legal authority to deal with the registration of the R2. There was no breach of natural justice that would have had jeopardised the applicant and there was no evidence showing blatant failure on R1's part in the performance of her statutory duty (see para 8).

(2) The applicant did not in fact represent the members of R2. Although the applicant was a national union representing the executive officers in the

banking industry, it was clearly established in the affidavit evidence that the members of the R2 being executives in the grade 10–12 were not represented by the applicant. The applicant admittedly represented the executive officers in Grade 9 and above in R3. Section 12(2) of the Act did not totally prohibit a registration of a union although there was already in existence a union registered for the particular classification of employees. There could indeed be blind spots in individual banks that would create injustice to a group of employees, who although they may be in the executive category, they were nevertheless not represented in a collective way thus putting them in a position of perceived disadvantage when negotiating with their employer for favorable terms in the collective agreements (see para 9).

(3) There was ample evidence that R1 had consulted the members of R2 and since the applicant did not cater for the R2's interest in R3 bank, it would be stretching it too far to say that the applicant had been denied its right to be heard by R1. In so far as R2 was concerned, as the applicant did not represent its members, the latter was at best, strangers to the proceedings and that it was correct that the R1 had so decided the way it did, in the absence of the applicant (see para 10).

(4) R1 had taken into consideration all the relevant factors and ignored the ones which were irrelevant. In all fairness it cannot be said that her decision had amounted to one that could be described as being perverse. It can hardly be said that R1 had been guilty of any such breach when she had decided the way she did. There was definitely no illogicality inherent in the embodiment of that decision, especially the manner in which it was arrived at by R1. A reasonable tribunal similarly circumstanced, would have come to the same decision as did the R1 in this case. This had not been a fit and proper case for the court to exercise its power by issuing the prerogative writ of certiorari to quash the decision of R1 that was impugned by the applicant (see para 11).

[Bahasa Malaysia summary

Pemohon merupakan kesatuan yang telah diiktiraf oleh Ketua Pengarah Kesatuan Sekerja ('R1'), untuk pegawai-pegawai di kesemua bank perdagangan di Malaysia dalam kumpulan kerja yang biasanya dirujuk sebagai 'eksekutif'. R1 telah mengiktiraf Kesatuan Eksekutif Bank Islam Malaysia Bhd ('KESATRIA') ('R2') yang sebenarnya terdiri daripada pegawai-pegawai eksekutif Bank Islam Bhd, ('R3'). Terkilan dengan pengiktirafan tersebut, pemohon memohon bagi semakan kehakiman di bawah A 53 Kaedah-Kaedah Mahkamah Tinggi 1980, untuk mendapatkan perintah *certiorari* untuk membatalkan keputusan oleh R1 dalam memberikan pengiktirafan kepada R2. Pemohon menegaskan bahawa keputusan tersebut adalah salah dan bercanggah dengan s 12(2) Akta Kesatuan Sekerja 1959 ('Akta'). Walaupun R1 mempunyai budi bicara di bawah s 12(2) untuk mendaftarkan kesatuan

A sekerja, pemohon menghujahkan bahawa budi bicara tersebut tidak boleh dilaksanakan dengan mendaftarkan kesatuan sekerja 'jika dia berpuas hati bahawa terdapat kewujudan kesatuan sekerja' dan bahawa ia bukan demi kepentingan pekerja-pekerja yang berkenaan bahawa terdapat satu lagi kesatuan sekerja.

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Diputuskan, menolak permohonan dengan kos:

(1) Pemohon tersebut tidak menunjukkan keadaan luar biasa tentang mengapa perkara ini seharusnya dibawa ke mahkamah. Terdapat peruntukan dalam Akta, untuk membuat rayuan kepada Menteri oleh C pemohon jika ia tidak berpuas hati dengan keputusan Ketua Pengarah ('KP') dalam mendaftarkan R2 sebagai kesatuan perdagangan dalaman dalam bank R3. KP mempunyai kuasa undang-undang yang perlu untuk berurusan dengan pendaftaran R2. Tiada pelanggaran keadilan asasi yang akan menjejaskan pemohon dan tiada bukti yang menunjukkan D kegagalan terang-terangan di pihak R1 dalam pelaksanaan kewajipan statutorinya (lihat perenggan 8).

(2) Pemohon sebenarnya tidak mewakili anggota R2. Walaupun pemohon adalah kesatuan kebangsaan yang mewakili pegawai-pegawai eksekutif E dalam industri perbankan, ia telah dibuktikan dengan jelas dalam keterangan afidavit bahawa anggota R2 menjadi eksekutif dalam gred 10–12 tidak diwakili oleh pemohon. Pemohon diakui mewakili pegawai eksekutif dalam Gred 9 dan ke atas dalam R3. Seksyen 12(2) Akta tidak sepenuhnya melarang pendaftaran kesatuan walaupun terdapat suatu F kesatuan yang berdaftar untuk klasifikasi tertentu pekerja. Sememangnya mungkin terdapat bintik buta dalam bank individu yang akan mewujudkan ketidakadilan kepada sekumpulan pekerja, yang walaupun mereka mungkin berada dalam kategori eksekutif, namun mereka tidak diwakili dalam cara yang kolektif sekali gus meletakkan mereka dalam G kedudukan yang dilihat kekurangan apabila berunding dengan majikan mereka untuk terma yang menguntungkan dalam perjanjian kolektif (lihat perenggan 9).

(3) Terdapat bukti yang mencukupi bahawa R1 telah berunding dengan ahli R2 dan oleh kerana pemohon tidak memenuhi kepentingan R2 dalam H bank R3, ia adalah berlebihan untuk mengatakan bahawa pemohon telah dinafikan hak untuk didengar oleh R1. Setakat mana R2 adalah berkenaan, oleh kerana pemohon tidak mewakili ahli-ahlinya, mereka adalah orang yang tidak privi kepada prosiding tersebut dan bahawa I adalah betul bahawa R1 telah memutuskan seperti yang sedemikian diputuskannya, dalam ketiadaan pemohon (lihat perenggan 10).

(4) R1 telah mengambil kira semua faktor-faktor yang berkaitan dan mengabaikan orang-orang yang tidak relevan. Secara adilnya, ia tidak boleh dikatakan bahawa keputusannya terjumlah kepada sesuatu yang

boleh dianggap tidak baik. Ia tidak boleh dikatakan bahawa R1 telah melakukan apa-apa pelanggaran dalam membuat keputusan sedemikian. Tiada yang tidak logik yang wujud dalam keputusan tersebut, terutamanya cara di mana ia telah dicapai R1. Sesuatu tribunal yang munasabah dalam keadaan yang sama, akan memutuskan yang sama seperti yang dilakukan R1 dalam kes ini. Ini bukanlah kes yang layak dan sesuai untuk mahkamah menjalankan kuasa dengan mengeluarkan prerogatif writ *certiorari* untuk membatalkan keputusan R1 yang telah dipersoalkan oleh pemohon (lihat perenggan 11).]

Notes

For a case on application for certiorari, see 2(1) *Mallal's Digest* (4th Ed, 2012) para 1903.

Cases referred to

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 223, CA (refd)

British American Tobacco (M) Berhad Employees Union v Ketua Pengarah Kesatuan Sekerja, Malaysia & Ors [2010] 1 LNS 1332, HC (refd)

Government of Malaysia & Anor v Jagdis Singh [1987] 2 MLJ 285; [1987] CLJ 110 (Rep), SC (refd)

Nordin Hj Zakaria (Timbalan Ketua Polis Kelantan) v Mohd Noor bin Abdullah [2004] 2 CLJ 777, FC (folld)

Robin Tan Pang Heng @ Muhamad Rizal bin Abdullah (suing as public officer at Penang Turf Club) v Ketua Pengarah Kesatuan Sekerja Malaysia & Anor [2011] 2 MLJ 457; [2010] 9 CLJ 505, FC (folld)

Legislation referred to

Rules of the High Court 1980 O 53
Trade Union Act 1959 ss 2(1), 12(2)

Chandra Segaran (P Kuppusamy & Co) for the applicant.
Suhaila Harun (Attorney General's Chambers) for the first respondent.
Yum Shirley (Ramesh Yum & Co) for the second respondent.
S Shalini (Lee Hishamuddin Allen & Gledhill) for the third respondent.

Abang Iskandar J:

[1] The background facts are within the knowledge of all parties and I do not wish to repeat them here in extensor. They could be gleaned with relative ease from the cause papers that had been filed accompanying this application as well as the papers filed by both the R1 and R2 in opposition thereto. But suffice for me to outline in brief the crux or the gist of the complaints that had since bedeviled the applicant.

[2] In this case, the applicant had been the recognised union by the Director-General of Trade Union, the first respondent ('the R1'), for all officers in all commercial banks in Malaysia in the job band commonly referred to as 'executives'. The R1 however had in the meantime recognised the *Kesatuan Eksekutif Bank Islam Malaysia Bhd* (KESATRIA), the second respondent ('the R2') who actually had been composed of executive officers of Bank Islam Bhd, the third respondent ('the R3'). The applicant was thus aggrieved by the recognition by R1 granted to the R2.

[3] The applicant had therefore made this application for a judicial review under O 53 of the RHC 1980, for an order of certiorari to be issued by this court to quash the said decision of R1 that had granted recognition on R2.

[4] This application was grounded upon to complaints trained at the impugned decision of the R1. One of the complaints raised had been that, the said decision was arrived at erroneously and was actually contrary to s 12(2) of the Trade Union Act 1959 which expressly has stated as follows:

> The Director-General may refuse to register a trade union in respect of a particular establishment, trade, occupation or industry if he is satisfied that there is in existence a trade union representing the workmen in that particular establishment trade, occupation or industry and it is not in the interest of the workmen concerned that there be another trade union in respect thereof.

[5] While conceding that the R1 has the discretion given under the said section to register a trade union as envisaged under that section, it was contended by learned counsel for the applicant that the same discretion may not be exercised in favour of registering a trade union 'if he is satisfied that there is in existence a trade union and that it is not in the interest of the workmen concerned that there be another trade union in respect thereof'.

[6] Clearly therefore there is, ipso facto, a desire to avoid a multiplicity of trade unions that would cater for the same particular occupation, in this case, that would be the executive officers of the commercial banks and that the DG may not register a trade union where there already exists a trade union that represents the workmen in the particular occupation. That caveat is put in place when it is not in the interest of the workmen concerned that there be established another trade union in respect the same occupation. The words of the said section refer to the satisfaction on the part of the DG in deciding whether to register another trade union. But that satisfaction cannot be achieved without there be a prior act on the part of the DG to duly consider.

[7] Having heard the submissions by all learned counsel in this case, I would

under the circumstances respectfully agree with the able submissions of both learned counsel for the R1 and R2 in that this application for judicial review be dismissed on more than one ground.

[8] First, the applicant has not shown exceptional circumstances as to why this matter ought to be brought before this court when in fact and in law, there is in existence a provision in the Trade Union Act, for an appeal to be made to the Minister by the applicant if it was not satisfied with the decision of the DG in registering the R2 as an in-house trade union within the R3 bank. The DG was properly clothed with the necessary legal authority to deal with the registration of the R2. There was no breach of natural justice that would have jeopardised the applicant and there was no evidence showing blatant failure on the part of the R1 in the performance of her statutory duty. These 'exceptional circumstances', as laid down in the *Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 285; [1987] CLJ 110 (Rep) case had not been shown by the applicant that would otherwise justified them coming running to this court for the prerogative relief that it was seeking *Robin Tan Pang Heng @ Muhammad Rizal bin Abdullah (suing as public officer at Penang Turf Club) v Ketua Pengarah Kesatuan Sekerja Malaysia & Anor* [2011] 2 MLJ 457; [2010] 9 CLJ 505 from this court. The decision in the Federal Court case of *Robin Tan Pang Heng* is clear in that regard. On that ground alone, this application must fail.

[9] Secondly, even assuming for a moment that this court was wrong in so deciding against the applicant based on the failure to resort to and to first exhaust the available internal remedy by way of an appeal to the Minister, however, having gone through the evidence in the various relevant affidavits concerned in this application, I am of the view that on due consideration of the issues raised by the applicant, on their merits, this court is not able to accede to the submissions put forward by learned counsel for the applicant. From a study of the affidavits, I am in agreement with learned counsel for the R1 in that the applicant did not in fact represent the members of the R2. Although the applicant was a national union representing the executive officers in the banking industry, it was clearly established in the affidavit evidence that the members of the R2 being executives in the grade 10–12 were not represented by the applicant. The applicant admittedly represented the executive officers in grade 9 and above in the R3. Section 12(2) of the TUA 1959 does not totally prohibit a registration of a union although there is already in existence a union registered for the particular classification of employees, for instance, the executive officers in a bank. The factual situation in this case has shown that there could indeed be blind spots in individual banks that would create injustice to a group of employees, who although they may be in the executive category, they were nevertheless not represented in a collective way thus putting them in a position of perceived disadvantage when negotiating with their

employer for favourable terms in the collective agreements. The R1 was satisfied that in registering the establishment of the R2 as an in-house union in the R3, it would not cause injustice. In fact, as the applicant did not represent the members who would make up the R2, the R1 was therefore correct in having registered the R2 as an in-house trade union in the R3. There was no duplicity created as a result of this exercise. The R2 is merely going to be a limited in-house trade union catering for the interest of executive employees in the R3 bank whose interests had been blind-sided by the applicant, wittingly or otherwise. The decision in the case of *British American Tobacco (M) Berhad Employees Union v Ketua Pengarah Kesatuan Sekerja, Malaysia & Ors* [2010] 1 LNS 1332, is clearly instructive in that regard, where learned justice Zawawi Salleh there had noted that the intention of Parliament, in inserting s 2(1) had been to encourage the flourishing of trade unionism and to enable the legitimising of in-house unions in spite of the existence of national unions. While that amendment had enabled in-house unions to be established despite there already existed a national union, that power is not a *carte blanche* for wanton establishment of such unions. In exercising that power, the decision maker is circumscribed, in the sense that he must be satisfied that justice, not injustice, will be achieved in such exercise. Therefore such power will not be exercised capriciously. It is the duty of this court as a review court, to ensure that such power is exercised within reason with due regard to the relevant factors in the circumstances of a particular case.

[10] Coming back to this case, there was ample evidence that the R1 had consulted the members of the R2 and since the applicant did not cater for the R2's interest in the R3 bank, it would be stretching it too far to say that the applicant had been denied its right to be heard by the R1, thus allegedly occasioning a breach of the principles of natural justice by the R1. A short shrift to that argument put forth by learned counsel for the applicant would be that in so far as the R2 as concerned, as the applicant did not represent its members, the latter was at best, strangers to the proceedings and that it was correct that the R1 had so decided the way it did, in the absence of the applicant. It is also to be noted that the legal provisions under consideration do not so provide and neither could it be reasonably inferred as of necessity, that such hearing be extended to persons such as the applicant in this case. That being so, the law is quite clear on that score, as stated by learned justice Siti Normah FCJ in the case of *Nordin bin Hj Zakaria (Timbalan Ketua Polis Kelantan) v Mohd Noor bin Abdullah* [2004] 2 CLJ 777 where Her Ladyship had said that there cannot be a breach of duty where none exists in law.

[11] It is clear that the R1 had, in coming to her decision taken into consideration all the relevant factors and ignored the ones which were irrelevant. In all fairness it cannot be said that her decision had amounted to one that could be described as being perverse. Her decision has passed the

Wednesbury's test as postulated in the celebrated case of *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223. Her decision was not one that was the product of an exercise in excess of her jurisdiction and neither was it an irrational one. In exercising this court's supervisory jurisdiction in dealing with this kind of application for a certiorari to issue, it is trite law that it is primarily concerned with the decision-making process and it is only in limited circumstances that a review court will wade into the propriety of the decision itself that is being impugned, in terms of its merits. This is because by and large the Parliament has in the Trade Union Act conferred that discretion on the R1 to make the attendant decision. The review court, such as this court, will be very slow to interfere and in the words of Lord Greene MR in the *Wednesbury*'s case, among others, as a judicial authority, 'it is concerned, and concerned only to see whether the executive have contravened the law by acting in excess of the powers which the Parliament has confided in them'. In this case, the R1 had stated in her affidavit in reply to the applicant's affidavit in support, as follows:

> Seksyen 12(2) Akta 262 memberi kuasa budi bicara kepada saya untuk menolak permohonan pendaftaran kesatuan sekerja sekiraya saya berpuashati bahawa telah ada suatu kesatuan sekerja mewakili pekerja-pekerja dalam penubuhan, tred, pekerjaan atau industri tertentu dan bukan menjadi kepentingan pekerja-pekerja dalam pertubuhan, tred, pekerjaan atau industri tertentu untuk mengadakan suatu lagi kesatuan sekerja yang lain berkenaan dengannya.

[12] It is patently clear therefore that the R1 had the necessary discretionary power to act in a manner befitting the circumstances before her as conferred under s 12(2) of the TUA.

[13] In this case, she had concluded that although she had the discretion not to register a trade union whereby there already existed a trade union that would cater for executives of bank employees, however, she was satisfied that the R2 would be comprised bank employees who were not at the moment represented by an union including the applicant. The R1 had stated in the same affidavit in reply as follows:

> Walaubagaimanapun, di dalam kes ini, saya telah berpuashati bahawa pada masa permohonan pendaftaran dibuat, tiada kesatuan sekerja yang mewakili pegawai-pegawai Gred G10-G12 di Bank Responden Ketiga dan adalah menjadi kepentingan bagi pegawai-pegawai Gred G10-G12 tersebut untuk diwakili oleh sesebuah kesatuan sekerja.

[14] Viewed against the above stipulations of what the functions of this court are, it can hardly be said that the R1 has been guilty of any such breach when she had decided the way she did. There was definitely no illogicality inherent in the embodiment of that decision, especially the manner in which it was arrived

A at by the R1. To my mind too, a reasonable tribunal similarly circumstanced, would have come to the same decision as did the R1 in this case.

[15] In the upshot, I agree with learned senior federal counsel acting for the R1 and learned counsel for the R2 that this has not been a fit and proper case B whereby this court ought to exercise its power by issuing the prerogative writ of certiorari to quash the decision of the R1 that was impugned by the applicant in this case.

[16] Premised on the above, this application was therefore dismissed by me C with costs. The applicant is ordered to pay costs of RM3,000 each to the R1 and the R2 and it is further ordered that the applicant to pay costs of RM1,000 to the R3.

D **[17]** Order accordingly.

Application dismissed with costs.

Reported by Ibnu Aswan

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